UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNIVERSAL CITY STUDIOS,

Plaintiff,

vs.

82 Civ. 4259

NINTENDO CO. LTD. and
NINTENDO OF AMERICA, INC.

Defendants.

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Before:

HON. ROBERT W. SWEET,

District Judge.

August 8, 1983
10:00 a.m.

APPEARANCES:

TOWNLEY & UPDIKE, ESQS.,
Attorneys for Plaintiff,
BY: DOUGLAS C. FAIRHURST, ESQ. and
MS. SANDRA EDELMAN

MUDGE, ROSE, GUTHRIE & ALEXANDER, ESQS.,
Attorneys for Defendants,
BY: JOHN KIRBY, ESQ. and
HOWARD LINCOLN, ESQ.
THOMAS GALLATIN, ESQ.

what trademarks are about:

"A trademark is a merchandising shortcut which induces a purchaser to select what he wants or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol."

I won't spend a great deal of time on the business of what the Japanese had in mind or did not have in mind when they developed Donkey Kong. There is no question in this case that whether they knew it or not, they had King Kong in mind in the motion picture -- had "King Kong" in mind, the motion picture, and were looking for the drawing power of a congenial symbol.

One of Nintendo-America's executives gave an interview to UPI sometime ago, and I put it in a footnote because it sort of makes the point in a way about what we are talking about here. This is not a case involving toothpaste or boxes of soap. That is what makes it difficult to put your finger sometimes on the trademark and what we are talking about. It is not a copyright infringement case and it is not necessary for the Court to sit for four hours and watch the two pictures right now. But what is necessary, I think I have to convey to the Court the importance of King Kong as a congenial symbol

that made the pictures. If they don't, I lose my case, but I think I can prove that.

The other market is more difficult and it is more difficult because the few cases that have attempted to grapple with this problem, the core of the problem is that people play the game and it is not toothpaste, they are not playing it because it is made by the wonderful folks who make pictures, but they are drawn to it because it is Kong.

THE COURT: It is ideational, though. It is a concept. It isn't a mark, it is a concept, an idea.

MR. FAIRHURST: I am not making a copyright claim, your Honor. I think Mr. Kirby is right --

THE COURT: You sort of concede that if it were just Donkey Kong, without the ape and the building --

MR. FAIRHURST: I would have a much rougher case. That is why I need all the elements in this case.

THE COURT: It is not a mark. It is an idea, it is a story.

MR. FAIRHURST: It is that, too. I don't think they are mutually exclusive. King Kong is a mark. It is used as a trademark. It was used by RKO for many, many years as a trademark. It was used by Paramount Pictures under license --

THE COURT: On the top, if it said Romeo and